(10)

No. 93-1456

In The

Supreme Court of United States

October Term, 1994

U.S. TERM LIMITS, INC., ARKANSANS FOR GOVERNMENTAL REFORM, INC., FRANK GILBERT, GREG RICE, LON SCHULTZ, and SPENCER PLUMLEY,

Petitioners,

-against-

RAY THORNTON, BLANCHE LAMBERT, DALE BUMPERS, DAVID PRYOR, *et al.*,

Respondents.

On Writ of Certiorari to the Supreme Court of Arkansas

BRIEF OF THE ALLIED EDUCATIONAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

BERTRAM R. GELFAND
JEFFREY C. DANNENBERG
(Counsel of Record)
SPECTOR, SCHER & FELDMAN
Attorneys for Amicus Curiae
The Allied Educational Foundation
655 Third Avenue
New York, New York 10017
(212) 818-1400

SW
St. Louis & Westervelt, Inc. (4472)
NY (212) 684-3117 NJ (201) 863-8133

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

CONSTITUTIONS AND STATUTES

Federal

State

OTHER AUTHORITIES

INTEREST OF THE AMICUS CURIAE

Allied Educational Foundation ("AEF") is a non-profit public interest group devoted to supporting the development of public policies that contribute to a free society in which the rights of individuals guaranteed by the United States Constitution are fully protected. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, including law and public policy, and has appeared as *amicus curiae* in the federal courts on a number of occasions. Supporters of AEF include representatives of business, labor and the general public.

It is the belief of AEF that true competition for elective office contributes to achieving good government and that a representative democracy is best served by facilitating the broadest access to the process of electing members of the United States Congress and the state legislatures. The ease with which private citizens are able to seek office, and the concern of elected officials for the general public, are severely impaired by an increasingly disproportionate capacity on the part of incumbents to be virtually immune from challenge.

AEF is concerned that a determination adverse to the petitioners will effectively contribute to the conversion of our legislative halls from bodies representative of different walks of American life to bodies increasingly characterized by professional legislators who make being legislators their lifetime vocation. Regrettably, this unfortunate circumstance is

exacerbated by the seniority system, which places disproportionate power in the hands of the career legislator. Legislative bodies in a democracy should consist of citizens from diverse backgrounds and vocations, not career bureaucrats whose only vocation is government.

By letters filed with the Clerk of the Court, the parties have consented to the filing of this brief by AEF on behalf of petitioners.

CONSTITUTIONAL PROVISIONS INVOLVED

1. Article I, § 2, cl. 2, and § 3, cl. 3, of the United States Constitution (the "Qualifications Clauses") provide, respectively, as follows:

> No Person shall be a Representative who shall not have attained to the Age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.
>
> No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

2. The Tenth Amendment to the United States Constitution provides as follows:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

STATEMENT OF THE CASE

The issue presented in this appeal concerns the extent to which a State has the power to restrict the number of consecutive terms that a candidate for the United States Congress may appear on the ballot for re-election. Specifically at issue is Amendment 73 of the Arkansas Constitution (hereinafter referred to as "Amendment 73"), which was approved by the people of the State of Arkansas in a general election held on November 3, 1992. Amendment 73 provides, in pertinent part, that no candidate elected to three or more terms in the United States House of Representatives, or to two or more terms in the United States Senate, shall be eligible to have his or her name placed on the ballot for re-election to that office.

On March 7, 1994, the Arkansas Supreme Court issued five separate opinions in *U.S. Term Limits, Inc. v. Hill*, 872 S.W.2d 349 (Ark. 1994), none of which was joined by a majority of the Court. Nevertheless, five of the seven Justices concluded that those portions of Amendment 73 applying to candidates to the United

States Congress were unconstitutional in that they violated the Qualifications Clauses.[1] Relying principally on this Court's decision in *Powell v. McCormack*, 395 U.S. 486 (1969), the plurality found as follows:

> [T]he Qualification clauses fix the sole requirements for congressional service. This is not a power left to the states under the Tenth Amendment. The attempt to add an additional criterion based on length of service is in direct conflict with the Qualification clauses . . . .

872 S.W.2d at 357. Nevertheless, the plurality acknowledged that Amendment 73 does not disqualify the long-term incumbent from seeking re-election, inasmuch as the candidate remains free to run as a write-in candidate or to be appointed by the Governor to fill a vacancy.

---

[1] In a separate aspect of the decision, the plurality held, *inter alia*, that term limitations imposed by Amendment 73 on *state* officeholders did not violate the First and Fourteenth Amendments of the United States Constitution.

SUMMARY OF ARGUMENT

The Framers of the United States Constitution intended that the people of the respective States have the power to pursue such courses as are necessary to elect to the United States Congress individuals who truly represent the will of the people. Yet, the concept of the "citizen legislator" has, to a great extent, been lost in the modern phenomenon of legislatures being essentially controlled by a self-perpetuating, professional aristocracy.

State initiatives, such as Amendment 73, that seek to limit the number of terms members of the United States Congress may serve by restricting access to the ballot are not offensive to the Constitution. In particular, proscribing access to the ballot based upon the length of a legislator's term in office does not constitute the type of restriction for which the Qualifications Clauses should be invoked. Moreover, even if this proscription were deemed a "qualification," it would, nevertheless, be permissible because the restrictions set forth in the Qualifications Clauses regarding age, residency and citizenship represent minimum, not exclusive, qualifications for elected officials to be seated in the Congress. Therefore, the people of the State of Arkansas were within their rights under the Tenth Amendment to restrict access to the ballot as a mechanism for limiting the inherent powers and institutional advantages of incumbents.

ARGUMENT

POINT I

LEGITIMATE STATE INTERESTS ARE SERVED BY AMENDMENT 73 AND SIMILAR LEGISLATION

Clearly, initiatives such as Amendment 73 are designed to make more difficult the efforts of long-term incumbents seeking re-election. Nevertheless, although the rights to seek election and to vote for the candidate of one's choice may be afforded the protection of the First and Fourteenth Amendments, those rights must be balanced against any legitimate state interests. *See Burdick v. Takushi*, 112 S. Ct. 2059, 2067 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).[2] The application of such a balancing analysis to the ballot restricting provisions of Amendment 73 fully justifies a finding upholding the constitutionality of the initiative, inasmuch as legitimate and significant state interests do, indeed, outweigh any individual rights that might be identified.

Having fought a revolution to separate the British Colonies of North America from a government ruled by an inherited monarchy and a self-perpetuating

---

[2] "Running for office is not a 'federal right' so as to require strict scrutiny of statute or state constitutional article placing restriction on qualifications for office." *Zielasko v. Ohio*, 873 F.2d 957, 959-60 (6th Cir. 1989).

aristocracy, it was the intention of the Framers of the Constitution to unite the sovereign states in a system under which the central government they were creating would be truly representative of the people who elected it. Long-term, or "entrenched," incumbency is a concept that is utterly foreign to such a federal system. This vision on the part of the Framers necessarily required a government in which the electorate would choose "citizen legislators"--that is individuals from different walks of life who would bring their personal and regional experience to the halls of Congress. What was not envisioned was a new ruling aristocracy, consisting of professional legislators who make remaining in public office their life's work, and who bring to the legislative halls none of the experiences of everyday life except being a worker in government. The power of incumbents to secure themselves in office for life has become so pervasive as to render the greater portion of Congressional power in the hands of a few, who function as the equivalent of peers for life, minimally exposed to challenge, and often above the will of the people.[3]

---

[3] Indeed, these concerns were specifically enumerated by the citizens of the State of Arkansas in the following "Preamble" to Amendment 73:

> The people of Arkansas find and declare that elected officials who remain in office too long become preoccupied with reelection and ignore their duties as representatives of the people. Entrenched incumbency has reduced voter participation and has led to an electoral system that is less free, less competitive, and less

It should also be noted that, at the time that the Framers established a minimum age of twenty-five years for service in the House of Representatives, and a minimum age of thirty years for service in the United States Senate, they did so in the context of a society in which life expectancy was well below fifty years of age. Implicit in the Framers' choice of age qualifications was a view that service in the legislative branch would rarely reach a decade in length. The efforts at term limitation constitute the expression of a desire on the part of the people to reverse the tide of long-term incumbency and to return the legislative branch of the federal government to the representative nature intended by the Framers of the Constitution.

Furthermore, since the drafting of the Constitution, technological advances have occurred that extend the resources of incumbent legislators far beyond those contemplated by the Framers. For example, incumbent legislators, on both the national and state levels, have conferred upon themselves a variety of expensive perquisites, funded by the taxpayers, which give to incumbents, with rare exception, an insurmountable advantage in the electoral process. These perquisites include free mailings and printings

---

representative than the system established by the Founding Fathers. Therefore, the people of Arkansas, exercising their reserved powers, herein limit the terms of elected officials.

costing from ten to hundreds of thousands of dollars,[4] publicly-funded telephone access to reach constituents, and substantial staffs, paid for by public funds, to indulge in activities designed to foster voter support. *See generally* Thomas E. Mann & Raymond E. Wolfinger, *Candidates and Parties in Congressional Elections, in* CONTROVERSIES IN VOTING BEHAVIOR at 268 (Richard G. Niemi & Herbert F. Weisberg eds.) (1984) ("even when information is scarce, incumbents are able to increase their visibility and improve their reputations by plying the tools of their trade: constituency service, news letters, direct mail, and so on"). As a result, incumbents generally have significantly greater name recognition than their opponents. *Id.* at 253.

Added to this publicly-funded advantage is the emergence of the visual and audio media as a primary source of information to the public. The existence of C-SPAN on cable television, for example, showing the procedures of Congress, gives incumbents an exposure advantage that few challengers could possibly afford to match.

In addition, Congress, itself, rewards long-term incumbency through seniority on committees and preferred committee appointments. "The electorate is then faced with a Hobson's choice of either supporting

---

[4] *See, e.g.*, Dennis Camire, *Lott Leads Delegation in Use of Free Mail Privilege*, GANNET NEWS SERV., June 26, 1992, at 1 (indicating totals of over $50,000 in free mail for some members of Congress).

the long-term incumbent or losing its place in the queue for federal monies that would be otherwise located in its district by a senior representative." Roderick C. Hills, Jr., *A Defense of State Constitutional Limits on Federal Congressional Terms*, 53 U. PITT. L. REV. 97, 144-45 (1991). *See generally* James C. Otteson, *A Constitutional Analysis of Congressional Term Limits: Improving Representative Legislation Under the Constitution*, 41 DE PAUL L. REV. 1 (1991) (describing the strong incentives voters naturally may have to re-elect incumbents merely to preserve their access to the spoils of seniority). In effect, Congress penalizes the citizens of a given state for voting against the incumbent, even though the opposition may be more popular and more capable.

Amendment 73 establishes a method for reducing the vast, and anti-democratic, advantages of the incumbent and re-establishes the even electoral playing field intended by the Framers of the Constitution. This Court has previously upheld state legislation designed to restore the status quo, where there existed an imbalance of power itself created by state regulation.[5] In *United States Civil Service Commission v. National Ass'n of Letters Carriers, AFL-CIO*, 413 U.S. 548 (1973), for example, the Court upheld the constitutionality of the "Hatch Act," which prohibited certain federal employees

---

[5] "It simply restores the status quo that would exist absent a distortion in the political marketplace caused by government intervention--the inordinate influence of the current office holders who use the prerequisites of office to dictate the result of the election." Hills, *supra* at 146.

from taking "an active part in political management of in political campaigns," *id.* at 550, or from "[b]ecoming a partisan candidate for, or campaigning for, an elective public office." *Id.* at 578 n.21. The legitimate state interest underlying the legislation that was identified by the Court "was the conviction that the rapidly expanding Government work force should not be employed to build a powerful, invincible, and perhaps corrupt political machine." *Id.* at 565.

Similarly among the principles underlying ballot restriction legislation such as Amendment 73 is that elections in which one side is heavily subsidized by the government are poor indicators of actual popularity.[6] Thus, the fact that long-term incumbency can be criticized for the lethargy, inactivity and elitism it can produce, as well as for its anti-democratic tendency, provide ample justification for initiatives such as Amendment 73.[7]

---

[6] Given these government subsidies to incumbents, the criticism that term limitations "are undemocratic" because they limit voter choice makes little sense. *See id.* (citing George Will, *Overdrawn at the Ballot Box*, WASH. POST, Oct. 3, 1991).

[7] Parenthetically, under the system of checks and balances established in the Constitution, the need for term limitations in the legislative branch of the federal government is just as important, and just as basic, as the need to immunize the judiciary from the politics of the electoral process.

POINT II

AMENDMENT 73 DOES NOT VIOLATE THE QUALIFICATIONS CLAUSES

A. The Qualifications Clauses Do Not Prescribe Characteristics Of The Candidacy, They Relate Only To Characteristics Of The Elected Individual

Both of the Qualifications Clauses begin with the phrase "[n]o person shall *be* a [representative or senator]." U.S. CONST., art. I, § 2, cl. 2 and § 3, cl. 3 (emphasis added). Plainly, such language relates only to service in the Congress, not to an election campaign. As Chief Justice Cracraft of the Arkansas Supreme Court amply explained, "the Qualifications Clauses protect only the right of a person who meets the qualifications of age, citizenship, and residency to be seated in the Congress if elected." *U.S. Term Limits, Inc. v. Hill*, 872 S.W.2d 349, 369 (Ark. 1994) (Cracraft, C.J., concurring in part, dissenting in part).

This construction of the Qualifications Clauses is fully supported by the language of Section 5 of Article I of the Constitution, which provides, in pertinent part: "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . . ." U.S. CONST., art. I, § 5. cl. 1. That provision gives enforcement power to each House of Congress, which might be necessary in the event that an individual were elected to a federal legislative position with less than the

minimum requirements set forth in the Qualifications Clauses. Thus, for example, it would not be unconstitutional for a state to permit a twenty year old individual from running for the House of Representatives; it would, however, be unconstitutional for that individual, once elected, to assume such an office. (And, the above-quoted provision of Section 5 of Article I would make the House of Representatives "the Judge" of whether the individual was, in fact, less than twenty-five years old, the minimum age prescribed for Representatives in Article I, § 2, cl. 2.)

B. Anti-Incumbency Ballot Restrictions Do Not Violate The Qualifications Clauses

If ballot restricting forms of term limitation initiatives do not raise the specter of "qualifications" for office, then their adoption should not require invocation of the Qualifications Clauses.

1. Term Limitations Are Not "Qualifications"

By holding that the ballot restriction prescribed in Amendment 73 constitutes a qualification for office (and, therefore, is violative of the Qualification Clauses), the Arkansas Supreme Court confused the concepts of "qualification" and "restriction." As the First Circuit Court of Appeals has held:

> The test to determine whether or not the "restriction" amounts to a "qualification"

> within the meaning of Article I . . . is whether the candidate "could be elected if his name were written in by a sufficient number of electors."

Hopfmann v. Connolly, 746 F.2d 97, 103 (1st Cir. 1984) (quoting *State v. Crane*, 197 P.2d 864, 871 (Wyo. 1948)), *vacated in part on other grounds*, 471 U.S. 459 (1985). Indeed, this holding echoed that of the Nebraska Supreme Court:

> [T]he question is not whether he may be a candidate, but whether he may . . . have his name printed on the ballot at the state's expense. He may be a candidate and if electors write his name on the ballot in sufficient numbers he will be elected. . . . The state statute in no manner seeks to add other qualifications. It does not prevent him from being a candidate. It is not unconstitutional.

State ex rel. O'Sullivan v. Swanson, 127 Neb. 806, 808-09, 257 N.W. 255, 255-56 (1934). *Accord Public Citizen, Inc. v. Miller*, 992 F.2d 1548 (11th Cir.), *aff'g based on decision in* 813 F. Supp. 821, 832 (N.D. Ga. 1993) (rejecting claim that state statute--prescribing that no candidate for public office, including United States Senate, may be seated unless he or she received a majority of the votes cast--violated the Qualifications Clauses); *Joyner v. Mofford*, 706 F.2d 1523, 1531 (9th Cir.), *cert. denied*, 464 U.S. 1002 (1983); *Heavey v.*

Chapman, 93 Wash. 2d 700, 611 P.2d 1256 (1980); *State ex rel. McCarthy v. Moore*, 87 Minn. 308, 92 N.W. 4 (1902); *see also Stack v. Adams*, 315 F. Supp. 1295, 1298 (N.D. Fla. 1970) (recognizing the importance of the distinction between a complete bar to election and a mere "strong practical deterrent to election").

In *Storer v. Brown*, 415 U.S. 724 (1974), this Court considered the constitutionality of a California law that denied ballot access to congressional candidates who had been affiliated with a political party within one year of the election. In upholding the state statute, this Court rejected the argument that the law violated the Qualifications Clauses:

> Appellants also contend that [the state law] purports to establish an additional qualification for office of Representative and is invalid under Art. I, § 2, cl. 2, of the Constitution. This argument is wholly without merit. . . . The non-affiliation requirement no more establishes an additional requirement for the office of Representative than the requirement that the candidate win the primary to secure a place on the general ballot or otherwise demonstrate substantial community support.

Id. at 746 n.16. *Cf. Munro v. Socialist Workers Party*, 479 U.S. 189 (1986) (barring from ballot candidates not receiving minimum vote in the primary); *American Labor*

Party of Texas v. White, 415 U.S. 767 (1974) (barring from ballot candidates without sufficient petition support).

Similarly, the provisions of Article 73 deliberately relate only to ballot restriction, not to a proscription against the incumbent's running for re-election. Accordingly, the initiative simply does not rise to a level that would implicate the Qualifications Clauses.

At worst, this initiative represents a temporary disability on current officeholders. As such, it is not substantively different from the Texas regulation, upheld by a plurality of this Court in *Clements v. Fashing*, 457 U.S. 957 (1982), which required state justices of the peace to serve out their terms before running for state legislative office. What amounted to a minimum two-year "waiting period" was characterized in the opinion by (then) Justice Rehnquist as a "*de minimis* burden on the political aspirations of a *current* officeholder." *Id.* at 967. "A 'waiting period' is hardly a significant barrier to candidacy." *Id.* (citing *Storer v. Brown*, 415 U.S. 724, 733-37 (1974)).

On its face, Amendment 73 might be viewed as erecting nothing more than a waiting period analogous to that approved by the Court in *Clements*. The citizens of the State of Arkansas have merely required that, once a federal legislator has achieved a certain term of incumbency (six years for a Representative, and twelve years for a Senator), he or she must wait at least one term before being returned to the ballot. On that basis

alone, the initiative should be upheld as posing a *de minimus* burden on the incumbent. The incumbent can return to his or her usual vocation for a two-year period before again seeking to represent his or her community.

2. The Restrictions Contained In The Qualifications Clauses Are Not Exclusive

The language used by the Framers in the Qualifications Clauses, and the structure of the Constitution itself, provide no basis for the conclusion that the restrictions prescribed in those clauses are exclusive. Early drafts of the Constitution apparently contained a variety of proposed restrictions on the characteristics that would be prescribed for the President, Senators and members of the House of Representatives. *See* Stephen J. Safranek, *Term Limitations: Do the Winds of Change Blow Constitutional?*, 26 CREIGHTON L. REV. 321, 350-51 (1993). As the list of characteristics grew, one member of the Constitutional Convention of 1787 noted, "It was impossible to make a complete [list], and a partial one would by implication tie up the hands of the Legislature from supplying the omissions." JAMES MADISON, JOURNAL OF THE FEDERAL CONVENTION 374 (Ohio Univ. Press 1984), *quoted in* Safranek, *supra* at 351.

If the Framers viewed term limitations as a mere detail not worthy of being cast in the stone of the Constitution, they must have viewed the imposition of such limitations as a subject that was left to such future action as the public deemed advisable, without

burdening the topic with a need to amend the Constitution. The obvious reason for the age, citizenship and residency requirements contained in the Qualifications Clauses was to protect Congress from immature or foreign influence. "To assume that the stated qualifications were exclusive is to misunderstand the reasons for establishing qualifications. The federal government wanted to prevent states from electing under qualified people to federal office, not to prevent states from adding to these qualifications as each state saw fit." Safranek, *supra* at 352.

The fact that the language in the Qualifications Clauses is expressed in the negative ("[n]o Person shall be a [representative or senator] . . ."), rather than in the affirmative (for example, "a person may be a representative or senator only if . . ."), further buttresses the notion that the clauses were designed to prescribe minimum qualifications beyond which the states were free to add. Such a construction is, indeed, supported by a reading of the Constitution, as a whole. For example, the Religious Test Clause prohibits both federal and state governments from imposing a religious test as a "qualification" for federal office.[8] If the age, citizenship

---

[8] The Religious Test Clause provides as follows: "The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any office or public Trust under the United States." U.S. CONST., art. VI, cl. 3.

and residency requirements prescribed in the Qualifications Clauses were considered exclusive, then the Religious Test Clause would be unnecessary, at least with respect to federal legislators.

The Court below was, therefore, incorrect in its reliance upon this Court's decision in *Powell v. McCormack*, 395 U.S. 486 (1969), to draw the conclusion that the Qualifications Clauses were intended to prescribe an exclusive list of characteristics for federal legislators. In *Powell*, the House of Representatives attempted to refuse to seat Representative Adam Clayton Powell, following his re-election, on the ground that he had wrongfully diverted federal funds to himself, his wife and members of his staff. This Court invalidated the House's action on the ground that the House had effectively added a new "qualification" to the three (age, citizenship and residency) set forth in the Qualifications Clauses. *Id.*

In addressing the issues in *Powell* a quarter of a century ago, the Court was viewing what appeared to be unfair treatment with respect to an African-American member of Congress. It is, indeed, questionable whether, if this issue were revisited today, the Court would reaffirm that Congress must go through the charade of first seating an electee before pursuing his or her removal for having, in a prior term, diverted funds.

In any event, the decision in *Powell* did not address the authority of *the states* to impose certain requirements, beyond the three set forth in the

Qualifications Clauses, on candidates for federal legislative positions. It is, therefore, respectfully suggested that *Powell* was, or should be, limited, at most, to its holding that *Congress* lacks authority to refuse to seat an individual who has been duly elected to office by his or her state and who meets the minimum requirements contained in the Qualifications Clauses. As set forth in Point III below, it is, under the Tenth Amendment, left up to the states to supplement the Qualifications Clauses by imposing any additional requirements not barred by some other provision of the Constitution.

POINT III

THE ADOPTION OF AMENDMENT 73 WAS WITHIN THE SOVEREIGN POWER OF THE STATE OF ARKANSAS UNDER THE TENTH AMENDMENT

This Court has consistently invoked the 14th Amendment to strike down legislation restricting access to the ballot that is based upon some invidious form of discrimination or unequal treatment. *See, e.g., American Labor Party of Texas v. White*, 415 U.S. 767 (1974); *Lubin v. Parish*, 415 U.S. 709 (1974); *Williams v. Rhodes*, 393 U.S. 23 (1968). Implicit in these holdings was the fact that, prior to the adoption of the 14th Amendment, the power to fix such restrictions (and, therefore, the power to restrict access to the ballot based upon any factors other than age, citizenship and residency) must have been reserved to the States.

Indeed, the Court has held that the states' "role in the selection both of the Executive and the Legislative Branches of the Federal Government" is a tool in the political process by which the citizens of the various states protect themselves from the federal government. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 551 (1985).

> The extent to which the structure of the Federal Government itself was relied on to insulate the interests of the States is evident in the views of the Framers. James Madison explained that the Federal Government "will partake sufficiently of the spirit [of the States], to be disinclined to invade the rights of the individual States, or the prerogatives of their governments."

Id. (quoting THE FEDERALIST No. 46, at 332 (James Madison) (B. Wright ed. 1961)).

In this vein, the Court has recognized that, under the Tenth Amendment, the powers that "remain in the State governments are numerous and indefinite." *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2399 (1991) (quoting THE FEDERALIST No. 45, at 292-93 (James Madison) (C. Rossiter ed. 1961)). In so doing, the Tenth Amendment ensures a decentralized governmental structure "that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic

processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry." *Id.* Indeed, these are some of the same policies that Amendment 73 is designed to further.

As a logical and general rule of constitutional interpretation mandated by the Tenth Amendment, limitations on the powers of the States should not be imposed, as a plurality of the Court below did, based upon inferences drawn from silence in the Constitution. Thus, even if the ballot access restrictions contained in Amendment 73 were deemed to create additional "qualifications" for office, they are provisions that should be permitted, inasmuch as the Constitution nowhere mandates that states may not add such qualifications to the three minimum standards set forth in the Qualifications Clauses.

CONCLUSION

For the foregoing reasons, the Order of the Court below should be reversed, and Amendment 73 of the Arkansas Constitution should be declared a valid exercise of the rights of the people of the State of Arkansas that is in no way offensive to the United States Constitution.

Respectfully submitted,

BERTRAM R. GELFAND
JEFFREY C. DANNENBERG
(Counsel of Record)
SPECTOR, SCHER & FELDMAN
655 Third Avenue
New York, New York 10017
(212) 818-1400

Attorneys for
Allied Educational Foundation
Amicus Curiae